

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE STATE UNIVERSITY SYSTEM  
ST. CLOUD STATE UNIVERSITY

In the Matter of the Suspension  
of J.H. from St. Cloud  
State University

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on Monday, October 9, 1995, in St. Cloud. The hearing concluded in one day, and the record closed at the end of the hearing.

Appearing on behalf of the State University System and St. Cloud State University (hereinafter the "University") was James Patrick Barone, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130.

Appearing on behalf of J.H. was William F. Garber, of the firm of Garber & Metcalf, Attorneys at Law, 333 Parkdale Plaza, 1660 South Highway 100, Minneapolis, Minnesota 55416-1531.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 (1994), the final decision of the President of St. Cloud State University shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the President. Exceptions to this Report, if any, shall be filed with Bruce F. Grube, President, St. Cloud State University, 740 Fourth Avenue South, St. Cloud, Minnesota 56301-4498.

STATEMENT OF ISSUE

Did J.H. violate the code of conduct during a series of sexual encounters with another student? If so, what penalty is appropriate?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. J.H. is a 22-year-old male. At the time of the incidents in question, which occurred during February or March of 1993, he was 19 years old. At that time, he was in the midst of his second year at the University.

2. J.C. is a female student at the University. She is currently 22 years old. At the time of the incidents in 1993, she would have been 19 years old as

well. She is currently in her fifth year at the University, and at the time of the incidents, she would have been in her second year.

**Due to the potentially identifying information in the remaining portions of the Findings, those Findings and a portion of the Memorandum have been redacted at the request of Saint Cloud State University. The unredacted document remains public data and may be obtained by appearing in person at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, Minnesota.**

15. In early May of 1995, J.C. met with LaDue and described what had happened two years earlier. The two talked about various counseling and reporting options available to J.C. Ultimately, J.C. decided to file a complaint with the University regarding a violation of the code of conduct. She signed a "Code of Conduct Complaint Form" on May 4, 1995. In the space where the form asked for a description of the incident, she inserted "see attached". Attached was a typewritten statement, prepared by J.C., which was dated May 5, 1995. It is fairly lengthy (four and one-half typewritten pages, double spaced). J.C. showed prior drafts of this to one of her friends as well as Lee LaDue, before finalizing it. However, LaDue did not suggest major changes to it.

16. On May 9, Dr. Lee E. Bird, Assistant Vice President of Student Life and Development, submitted J.C.'s complaint to the University's security director, who began an investigation. Ex. 3. On that same date, Bird sent a letter to J.H., indicating that a complaint had been filed, and indicating its nature and source. The letter directed J.H. to contact Bird to schedule a hearing and discuss the matter. Ex. 4.

17. **REDACTED.**

18. **REDACTED.**

19. On May 16, 1995, Dr. Bird conducted a hearing on the complaint. Either later on that day or the next, Bird interviewed four individuals who were named by either J.C. or J.H. as being able to corroborate various allegations.

20. **REDACTED**

21. **REDACTED**

22. **REDACTED".**

23. Dr. Bird determined that it was more likely than not that violations of the code of conduct had occurred between J.H. and J.C. She suspended J.H. from the University for a period of four quarters (excluding summers), to take effect 24 hours following his last final exam, which would make him eligible for readmittance for winter quarter in December of 1996. He also would have to obtain counseling. He would not be allowed to reside in a residence hall, and he was to have no contact with J.C. or another named female. The letter closed with a notice of appeal rights. Ex. 7. It is clear from the letter that Bird based her decisions in part on her post-hearing interviews.

24. On May 22, J.H. filed an appeal with Dr. David Sprague, the Vice-President of Student Life and Development. He indicated that the two stories given by himself and J.C. to Dr. Bird were very different, and that he did not believe that J.C. had proven her story to be more correct than his. He also alleged a procedural error in connection with Bird's post-hearing interviews. Finally, he indicated that even if he had violated the code as alleged, the four-quarter penalty was excessively severe in light of his clean record in the past, his commitment to community service, and other reasons stated. Ex. 8.

25. On June 6, 1995, Dr. Sprague responded, indicating that his review of the file and contact with other authorities led him to the conclusion that there was insufficient evidence for him to overturn the case or alter the decision in any way. He upheld the decision of Dr. Bird, as well as the sanction, and indicated J.H.'s appeal rights for a contested hearing before an Administrative Law Judge. Ex. 9.

26. On July 7, 1995, J.H., through his attorney, William F. Garber, filed an appeal from the findings of violation and the sanction.

27. On August 11, 1995, Bruce F. Grube, President of St. Cloud State University issued a Notice of and Order for Hearing, setting a hearing in this matter for September 19 and 20. The hearing had to be continued because J.H.'s attorney could not locate J.H. in order to prepare for it. Ultimately, it was agreed that the hearing would take place on October 9, which it did.

28. J.C. has seen a professional counselor three times, in July and August of 1995. In addition, she has met with Lee LaDue several times.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Administrative Law Judge and the President of St. Cloud State University have jurisdiction in this matter pursuant to Minn. Stat. § 14.50 and the appeals procedure set forth in the University Code of Conduct. The Notice of and Order for Hearing issued by the University was proper in all respects and the University has complied with all procedural and substantive requirements of statute and rule.

2. At all times relevant hereto, the University's Code of Conduct provided that disciplinary action could result from certain offenses, including:

criminal sexual behavior, including but not limited to, the implied use or threatened use of force to engage in any sexual activity against a person's will and/or engaging in such behavior with a person who is unconscious, substantially mentally impaired (including intoxication); intentionally touching another person's genitals, buttocks or

breasts without the person's consent; indecent exposure; voyeurism.

3. J.H. was subject to this code of conduct. He violated it by engaging in sexual intercourse with J.C. on three occasions without first clearly obtaining her consent.

4. Under the facts as found above, a suspension of four quarters is too severe. A penalty of a suspension for one academic quarter, coupled with a requirement for counseling, a prohibition against living in coeducational residence halls, and a prohibition against contact with the two females is appropriate.

Based upon the foregoing, and all of the files and proceedings herein, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the decision and sanctions of Dr. Lee F. Bird be AFFIRMED in all respects, except that the length of the suspension be reduced from four quarters to one quarter.

Dated this 16th day of October, 1995.

s/ Allan W. Klein

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ALLAN W. KLEIN

Administrative Law Judge

Reported: Tape Recorded; four tapes

#### NOTICE

It is respectfully requested that the President serve a copy of his final decision upon each party and the Administrative Law Judge by first-class mail.

#### MEMORANDUM

This is a situation of two sexually immature and socially immature young people becoming involved in a sexual relationship and failing to communicate their true feelings about it. Both have some responsibility for the events, but the greater responsibility must be borne by J.H.

**REDACTED.**

**REDACTED.**

**REDACTED**

**REDACTED**

The Administrative Law Judge believes that both of them now think they are telling the truth. The allegations did not surface until more than two years after the events, and the Administrative Law Judge believes that both of the parties have forgotten the details of what happened. He also believes that both of them embellished their stories to make them more consistent and less embarrassing.

**REDACTED.**

**REDACTED**

**REDACTED.**

Keeping all of the foregoing in mind, the Administrative Law Judge has reached the conclusion that J.H. did violate the code because he failed to be sure that his advances were welcome. He claims he did ask, that he asked twice, and that both times she said yes. The Administrative Law Judge does not believe that. Instead, he believes that things happened essentially as set forth in the Findings. He didn't ask, and she didn't say. The standard of conduct warns that disciplinary action may result from intentionally touching another person's private parts "without the person's consent". J.H. thought he could proceed unless she clearly said "no". That was wrong. To avoid a violation, he should have been sure that she consented. He did not do this, and thus he is in violation.

The ambiguity of J.C.'s behavior, however, suggests that a four-quarter suspension is excessively severe. If she had been clear in saying, "No, I don't want to have sex", or "No, stop that right now", or some similarly straightforward statement, then the Administrative Law Judge would have no problem supporting the lengthy suspension, or even a full expulsion. However, that did not happen here. Therefore, a more reasonable sanction would be a one-quarter suspension. Moreover, the Administrative Law Judge believes that the severity of the sanction selected was based, in part, upon a procedural error in Dr. Bird's handling of the matter. After Dr. Bird held the hearing and heard the two divergent stories, she proceeded to try to corroborate one story or the other by talking with other persons. One of the individuals contacted by Dr. Bird allegedly told Dr. Bird that J.H. had sexually assaulted her some time earlier, but that she did not report it. Dr. Bird noted that in her decision letter of May 17, devoting some space to recounting the girl's statements. It is reasonable, therefore, to believe that this information played a part in Dr. Bird's determination of how severe the sanctions should be. Minn. Rule pt. 8500.0400, which was cited by the University in the Notice of Hearing, provides, in subpart 2, that the University shall not consider statements made against an individual unless the individual is either present when they are made or is advised of them and given an

opportunity to rebut unfavorable inferences which might otherwise be drawn. There is no indication that Dr. Bird gave J.H. an opportunity to rebut the inference which Dr. Bird drew from her post-hearing conversation with the other girl.

In summary, what happened between J.C. and J.H. should not have happened. Both the University's Code of Conduct and common standards of human behavior require that both parties consent to such intimate sexual contact. A person who fails to be sure that there is consent runs the risk of violation and punishment. Under the circumstances as the Administrative Law Judge has found them, J.H. deserves some penalty for his behavior. But it was not so egregious as Dr. Bird believed, nor as egregious as J.C. now believes. Therefore, the recommendation is for a reduced penalty.

AWK